



Ndalut & another v Nairobi City Water & Sewerage Company Ltd (Employment and Labour Relations Petition E099 of 2022) [2025] KEELRC 425 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 425 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E099 OF 2022**

JW KELI, J

FEBRUARY 14, 2025

BETWEEN

KIPTOO NDALUT 1ST PETITIONER

GRIBBIN CHOGO LIBABU 2ND PETITIONER

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LTD RESPONDENT

JUDGMENT

1. The petitioners were employees of the respondent and citing unfair labour practices of undefined long period in acting positions filed a petition dated 16th June 2022 seeking the following reliefs:-
 - a. A declaration that keeping the Petitioners in an Acting capacity for over three (3) years was unlawful and violated the Petitioners' right to fair labour practice.
 - b. A declaration that causing the Petitioners to serve in the offices of Security Manager for over 4 years respectively beyond the lawful acting period amounted to constructive confirmation of the Petitioners as the substantive holders of the respective offices at the respective times.
 - c. A declaration that the Respondent has violated the Petitioners' right to legitimate expectation by not confirming or appointing them as their Security Officers in Charge of Informal Settlement Region.
 - d. An order for damages for violation of the Petitioners' Constitutional Rights.
 - e. An order for general damages for discrimination, violation of the petitioner's right to human dignity and self-worth, fair labour practices, fair administrative action and freedom from servitude.



- f. A permanent injunction restraining the Respondent from taking the Petitioners' back to a position which is lower than their current positions of Security Informal Settlement Region (Job Group 3) or victimizing or treating the Petitioners unfairly on account of this Petition.
 - g. An order of judicial review in the form of Certiorari to bring into this Court and quash the decisions contained in the Respondent's Internal Advertisement and Re-advertisement through the Circular dated 17th November, 2021 to the extent that they deal with the position of Security Officer.
 - h. An order directed to the Respondent to confirm the Petitioners' in the positions of Security Officers.
 - i. General Damages.
 - j. Interest at Court rates.
 - k. Any other relief that this Honourable Court may deem just to grant.
2. The petition was filed together supporting affidavit of the 1st petitioner dated 16th June 2022 where he annexed an appointment letter to the position of acting security officer dated 9th April 2019, letter dated 12th April 2022 being extension acting capacity as a security officer based at Northern Region for a period of 6 months, a circular dated 17th November 2021 by the respondent of internal recruitment advertising various positions among them being the position of security officer, performance appraisal form, appeal for consideration not acted upon (Annexures KN1-KN5 respectively).
 3. The 2nd Petitioners' in witness statement dated 16th June 2022 stated he was appointed to acting position in 2018. The appointment had no indication of the acting period. The 2nd petitioner annexed memo dated 12th July 2019 appointing him again to same position as acting security officer, extension of appointment on acting capacity dated 16th December 2021, internal advertisement circular of 17th November 2021, appeal to the respondent on failure to shortlist him for the position he had been acting in, performance appraisal forms (Annexures GCL-4).
 4. The petitioners further filed list of documents dated 16th June 2022 and produced the bundle of documents.

Response.

5. The petition was opposed. The respondent entered appearance vide the law firm of MCKAY & Company Advocates and filed a replying affidavit sworn by Titus Tutioek on the 7th of February 2024. The deponent produced letters of appointment of the petitioners to acting security officer for 1st petitioner dated 9th April 2019 and 2nd petitioner 12th June 2018 (TT-1), internal memos of transfers of the petitioners to the Northern and Northern Eastern Regions dated 30th October 2019 (TT-2), The respondent's Human Resource Policy and Procedures Manual providing for an acting period of 6 months or such other period as the employer may deem fit (TT-3). The deponent averred that the appointing authority, the respondent's Managing Director continuously extended the petitioners' respective appointments for consecutive six (6) month periods which has allowed them to serve in their respective positions (TT-4 were copies of various internal memos extending the petitioners' appointments). The deponent averred that the petitioners took the positions and started drawing acting allowances in accordance with Clause 6.3 of the Respondent's Human Resource Policy and Procedures Manual (TT-5 were copies of the petitioners' payslips). The deponent further annexed the job descriptions setting out the responsibilities and qualifications for the position of security officer as advertised in the said internal advertisement (TT-6). Copies of letters by the petitioners to the



Director of Human Resources and Administration appealing the respondent's decision not to shortlist them(TT-7) and letter dated 6th June 2022 in response to the petitioners to the effect that they could not be shortlisted as they did not meet the academic requirements for the positions they were acting in (TT-8).

6. The petition was canvassed by way of written submissions. Both parties complied.

Determination

7. The petitioner submitted that the main issue for determination in the Petition was whether the Petitioners should be confirmed in the Acting roles and whether the act of the Respondent in having them serve for up to 6 years without confirmation violated their rights thus entitling them to the reliefs sought in the petition.
8. The respondent on the other hand identified the following issues for determination in the petition:-
 - a) Whether the actions of the Respondent have violated the Petitioners right to fair labour practices, fair administrative action, right to human dignity and freedom from servitude?
 - b) Whether the Respondents should be confirmed as substantive office holders?
 - c) Whether the Respondent has violated Petitioners right to legitimate expectation?
 - d) Whether the Petitioners is entitled to the prayers sought in his Petition?
 - e) Who should bear the costs of the Petition?
9. The court on perusal of the court record found a ruling by the previous Trial Judge (Justice Ocharo Kebira) handling the petition which in the mind of the court was a final decision on some of the issues under the petition. The ruling was dated 26th October 2023 on the application by way of Notice of Motion dated 16th June 2022 by the petitioners. (Ndalut & another v Nairobi City Water & Sewerage Company [2023] e KLR). The application sought the following substantive order:-

That the Honourable Court be pleased to issue an Interim Order of injunction against the Respondent, its servants, agents and/or employees restraining them from conducting interviews and/or filling the position of Security Officer of Informal Settlements Region pursuant to the Respondent's advertisement circular dated 13th May 2022 pending the hearing and determination of this Petition.

10. The court found the following paragraphs in the Ruling dated 26th October 2023 to contain final decisions :-
 - “24. On the issue of appointments in acting capacities, the Respondent's Human Resources Policy and Procedures Manual, which is produced by the Respondent as Exhibit “TT-2” attached to its Replying Affidavit sworn on 8th August 2022, at Clause 6.3 provides in part as follows: -“An employee who is appointed by the MD/DHRAS to act upon a vacant post will be required to act upon such a post for a maximum period of six (6) months or as determined by the appointing authority. Such appointment shall be in writing”.
 25. The stipulation above places a wide discretionary authority on the Respondent to decide for how long an employee may serve in the acting capacity after the initial six months. The engagement of the Petitioners/Applicants as Acting Security Officers by the Respondent for more than 3 years and 4 years respectively, would appear not offensive to the Respondent's



Human Resource Policy. The acting cannot be a reason that would wet the Petitioner's expectations that they could be substantively appointed, therefore."

Further, my perusal of the Respondent's Human Resources Policy and Procedures Manual does not unearth any provision whatsoever for automatic confirmation of an employee who is acting or has acted during the period when a position fell vacant within the ranks of the Respondent.

27. The Instrument insists on competitive recruitment and selection. This I find aligns with the Constitutional requirements of transparency, integrity and accountability under the national values and principles of governance. The insistence is also in accord with the contemplation under the County Government Act.
28. There is no dispute that the 1st and 2nd Petitioners/Applicants held the positions of Security Officers (Grade 5) for 3 years and 4 years respectively prior to filing this suit. There is also no dispute that their respective heads of department subjected them to appraisals where they were found to be satisfactory in their duties and recommended them for confirmation in 2020. Despite the foregoing, it is this Court's considered view that there was an obligation on the Respondent imposed by its Human Resource Policy to weigh the Petitioners/Applicants for the substantive positions against its competency framework thereunder.
29. This Court has held time and time again that as a general principle, it will not interfere with an employer's right to perform internal human resources functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function unless it can be shown that the functions are done with disregard to *the Constitution* or other legislation, the agreement between parties, or fair labour practices. This position has been upheld in several cases including Kenya Plantation and Agricultural Workers Union vs James Finlay (K) Limited [2013] eKLR and Geoffrey Mworira vs Water Resources Management Authority & 2 Others [2015].
30. The Petitioners/Applicants have not argued that the qualifications required by the Respondent for the substantive position in some way contravened *the Constitution*, legislation, or the agreement between parties, or were in some other way unfair. Sight has not been lost that the Petitioners/Applicants submitted to the recruitment procedure and applied for the substantive position. Their only grievance is that they were not shortlisted. As was stated in John Ndiritu Nguyo v Kenya Ports Authority & William Kipkemboi Ruto [2016] eKLR, the Petitioners condoned the actions of the Respondent. If they had a complaint regarding the recruitment procedure or qualifications, they should have approached the Court before applying for the position.
31. In light of the foregoing lengthy analysis, I am persuaded that the Petitioners/Applicants have not proved that they have a prima facie case with a probability of success."(emphasis given)
11. The foregoing are decisions that have not been appealed against. This being a court of concurrent jurisdiction and without contrary evidence cannot make contrary decisions. The parties relied on the very same documents as in this petition and the Judge adjudicated on the same and made findings.
12. In Paragraph 33 of the Ruling, Justice Ocharo Kebira, the then Trial Judge observed:-

"Nevertheless, in the interest of completeness, I return that the Petitioners/Applicants' application would also fail on the second ground for the reason that an award of damages would be sufficient to compensate any injury suffered by them emanating from this Court's failure to grant an injunction as prayed. I gather support for my said conclusion from



the case of Oyatsi *v Judicial Service Commission (Petition E111 of 2021)* [2022] KEELRC 3 (KLR) (10 March 2022) (Judgment), where the successful litigant who complained of similar circumstances was awarded damages as compensation for her injury. “

13. Taking into account the foregoing the court was of the considered opinion that the outstanding issues for determination were as follows:-
 - a. Whether the action of the Respondent of undefined long acting appointments of the Petitioners in the now advertised positions violated the Petitioners’ right to fair labour practices and fair administrative action.
 - b. Whether the Petitioners were entitled to the reliefs sought.

Whether the action of the Respondent of undefined long acting appointments of the Petitioners in the now advertised positions violated the Petitioners’ right to fair labour practices and fair administrative action.

Petitioners’ submissions

14. While the Respondent sought to justify the acting appointments on the basis of its Human Resource Manual, the said manual cannot override the provisions of statute. It is settled law under section 34 of the *Public Service Commission Act* that a party cannot act in a position unless the person satisfies all the prescribed qualifications for holding the substantive position. In fact, section 34 provides as follows:-

“34. Acting appointments

- (1) Acting appointments shall be—
 - (a) Amade by the lawful appointing authority; and
 - (b) subject to the prescribed regulations and procedures which apply to appointments.
- (2) A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.
- (3) An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.
- (4) A public officer may be assigned to perform duties vested in another public officer during a temporary absence of the other public officer .”Section 34 provides for very clear provisions in terms of who can be appointed and for which period. One has to be competent and second its only for a period not exceeding 6 months. There is a good reason why statute capped acting appointment for only upto 6 months.

15. The Petitioners submitted that this case is exactly like the case of Oyatsi *v Judicial Service Commission (Petition E111 of 2021)* [2022] KEELRC 3 (KLR) (10 March 2022) (Judgment) in which case the Petitioner had acted for six years as Director Finance and on two occasions when she had applied for the position she was informed that she was unqualified but still retained on an acting capacity. The irony was why appoint an employee to act for six years then turn around and say he or she is not qualified while at the point he or she acted there is no issue as regards their performance. Confronted with the same issue in the case of *Gicheba v Nairobi Water and Sewerage Co. Ltd (Petition E083 of 2022)* [2024] KEELRC 1984 (KLR) (30 July 2024) (Judgment) the Court while awarding damages of Kshs



500,000/- to the Petitioner observed that prolonged acting in a position amounts to an unfair labour practice. The Court observed as follows;

“182. Clearly, since the Respondent appointed the Petitioner to act in the position of Regional Manager Informal Settlement Region and has not alleged that it made a mistake or that the appointment was subject to any condition, and having affirmed that the appointment was made in consonance with the HR Manual, it is discernible that the Respondent was aware that the Petitioner was qualified to hold the position and that’s why it paid him an acting as opposed to special duty allowance and is not re-claiming it from him.

183. The foregoing justified the Petitioner’s application for the position and ought not be used against him though he ought to have raised the issue prior to lodging the application.”

16. The Petitions submitted that there was no justification for not confirming them to the acting positions and that the Respondent has not adduced any document from its Competency Framework why the Petitioner acting positions require a Bachelors Degree. The Petitioners position is not a managerial position. This was just a way to lock out the Petitioners thus any advertisement made along this lines is illegal and ought to be struck out.

17. The petitioners asserted that when an employer keeps an employee in abeyance on an acting appointment for a pro-longed period of time then the same can be termed as an unfair labour practice regardless of payment of the acting allowance. In *Kenya Shoe and Leather Workers Union v Slapper Shoe Industries* [2015] eKLR, the Court found:-

“ the court agrees with the Conciliator by using the Grievants for prolonged period of time in acting capacity while paying them acting allowances, the respondent engaged in unfair Labour Practices. It affected the upward mobility of the Grievants’ careers and it is little wonder that some have since left employment.”

18. In the case of *Oyatsi v Judicial Service Commission (Petition E111 of 2021)* [2022] KEELRC 3 (KLR) (10 March 2022) (Judgment), the Honourable Court while compensating the petitioner therein for the violations in retaining her in acting capacity for over six years, the Court deemed the petitioner as the substantive holder of the position after 18 months of her appointment in the acting capacity.

Respondent’s submissions

19. The Respondent submitted that the assertion that it breached the Petitioners’ right to fair labour practices and fair administrative action under Articles 3(1), 41(1) and (2), 47 (1) and (2) of *the Constitution* was unfounded and has not been pleaded with the reasonable precision demanded in *Anarita Karimi Njeru vs Republic (No. 1)* (1979) eKLR and expounded in *Mumo Matemba vs Trustees Society of Human Rights Alliance and 5 Others* (2013) eKLR. The principles enunciated in the above cases demand that the Articles of *the Constitution* cited by the Petitioners, must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. It is trite law that the manner in which the alleged violations were committed and to what extent be shown by way of evidence based on the pleadings. That the Petitioners pleaded violations of their constitutional rights. However, they had not demonstrated to the required standard how their rights to fair labour practices and fair administrative actions were violated, infringed or threatened by the Respondent. No evidence had been adduced to demonstrate the alleged violations other than offering spurious allegations.



20. The Respondent contended that the Petitioners' case had not passed the test of burden of proof given that he who alleges must prove. In *Leonard Otieno vs Airtel Kenya Limited* (2018) eKLR, the Court in holding that a claim must be proved on evidentiary foundations stated thus:

"It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses." From the facts enumerated on the petition, the matters pleaded do not constitute violations of *the constitution* but are rather, administrative issues that are covered under the internal terms and conditions of service governing the employment of the Petitioners. From the foregoing, it was clear that the allegations in the Petition are unsubstantiated. The Respondent further submitted that this was an employment dispute that the Petitioners had elevated to the constitutional pedestal. That guided on the foregoing the Petitioners had failed to lay a basis for their case and urged the court to dismiss the same.

21. The Respondent asserted that the general principle is that the court will not interfere with any of the employer's rights to perform internal human resource functions. Employers have the discretion and managerial prerogative power to appoint. The power of appointment is essentially discretionary meaning that courts cannot control or dictate it. The Respondent had at all times acted in accordance with the Respondent's Human Resource Policy and Procedures which binds both parties. The appointment of the Petitioners in acting capacity to the position of Security Officers was made in accordance with the Respondent's Human Resource Policy and Procedures Manual. Clause 6.3 provides that an employee may be appointed in an acting capacity for a period of 6 months or such other period as the appointing authority may deem fit. Thus, in regard to keeping the Petitioners in an acting capacity of over three years without confirmation, the court to note that the Respondent's Human Resource Policy and Procedures Manual in clause 6.3 gives the Respondent a wide discretionary authority to determine the period that one can hold office in acting position.
22. The appointment and subsequent extensions of the Petitioners acting capacity had always been on the basis that the same was subject to the position being filled competitively/substantively. Further, the Respondent's Human Resource Policy and Procedures Manual does not unearth any provision for automatic confirmation where an employee has acted beyond the acting period. Throughout the Petitioners' service period as Acting Security Officers, the Petitioners have always been adequately remunerated by being paid an acting allowance in the form of non-pensionable salary increase of up to 25% of the staff member's basic salary or an acting allowance equivalent to the difference between their own salary and the minimum salary of the post upon which he is acting, whichever is higher for the period in which the duties of higher-level post are assumed in accordance with clause 6.3 of the Human Resource Policy and Procedures Manual. 24.
23. The courts have in several occasions held this position that they will not interfere with an employer's right to perform internal human resources functions such as recruitment, appointment, promotion, transfer disciplinary control, redundancy or any other human resource function. This was aptly held by the court in *Kenya Plantation and Agricultural Workers Unions vs James Finlay (K) Limited* (2013) eKLR and *Geoffrey Mworira vs Water Resources Management Authority & 2 Others* (2015) eKLR. To necessitate this court's intervention and interference, the Petitioners must demonstrate that the



Respondent is proceeding in a manner that is in contravention of the provision of *the Constitution* or legislation, or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process. The Court cannot therefore be used to influence the recruitment process in favour of a particular individual, which is what the Petitioners are attempting to do, through the present Petition.

Decision

24. The petition was hinged on violation of the constitutional right to fair labour practices and fair administrative actions according to Articles 41 and 47 of *the Constitution* respectively.

25. Article 41 provides for the right to fair labour practices for employees as follows:-

“41. Labour relations

- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.”

26. Article 47 provides for fair administrative action as follows:-

“47. Fair administrative action

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

27. The petitioners relying on the foregoing constitutional provisions pleaded the facts on the violations and filed affidavits both dated 16th June 2022 annexing the documents in support of their petition. The same have been outlined in the judgment.

28. As stated earlier the previous Trial Judge only left the issue of the court to decide whether the long undefined acting was in violation of the petitioners' constitutional rights to fair labour practices and fair administrative action and whether they were entitled to damages for the violations and even cited the decision in *Oyatsi v Judicial Service Commission (Petition E111 of 2021)* [2022] KEELRC 3 (KLR) (10 March 2022) (Judgment).

29. On the acting period Justice Ocharo Kebira summarised the facts as follows which I found sufficient for the purposes of the judgment:-

“The evidence presented before this Court by both the Petitioners/Applicants and the Respondent points to the appointments of the 1st and 2nd Applicants as Acting Security



Officers (Grade 5) on 9th April 2019 and 12th June 2018, respectively, vide Internal Memos signed by one Eng. Nahashon Muguna, Acting Managing Director. The said Internal Memos are marked as Exhibit “KN-1” and attached to the 1st Petitioner’s Affidavit in Support of Application and on the Respondent’s Replying Affidavit. On the face of it, the Memo dated 9th April 2019 appointing the 1st Petitioner expressly states that the appointment is for six (6) months, subject to the position being filled competitively. The Memo dated 12th June 2018 appointing the 2nd Petitioner to the acting position is silent on the end date of his appointment.

Subsequently, both the 1st and 2nd Petitioners/Applicants were issued with several six (6) month extensions for service in their acting positions. Per the evidence before this Court, the 1st Petitioner/Applicant received extensions vide Internal Memos dated 9th April 2019, 17th October 2019, 7th May 2020, 12th October 2020, 14th April 2021, 5th October 2021, and 12th April 2022. The 2nd Petitioner/Applicant received extensions vide Internal Memos dated 28th January 2019, 12th July 2019, 17th February 2020, 22nd June 2020, 3rd December 2020, 16th June 2021, and 16th December 2021. It does not escape this Court’s attention that a majority of the said internal memos also expressly state that the appointments are subject to the positions being filled competitively/substantively.

On the issue of appointments in acting capacities, the Respondent’s Human Resources Policy and Procedures Manual, which is produced by the Respondent as Exhibit “TT-2” attached to its Replying Affidavit sworn on 8th August 2022, at Clause 6.3 provides in part as follows: -“An employee who is appointed by the MD/DHRAS to act upon a vacant post will be required to act upon such a post for a maximum period of six (6) months or as determined by the appointing authority. Such appointment shall be in writing”.

30. The petitioners in written submissions relied on the provisions of *Public Service Commission Act* section 34 (3) to wit:- “An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.” The court was not informed on what basis the citation was invoked. It was not pleaded. However, the court noted that the Public Service Commission no doubt provides best human resources practice in the public service and perhaps that is why the Respondent’s Human Resource Policy and Manual provides for acting period of 6 months but qualifies it for extension at its discretion. The court holds that continuous acting period was a violation of the petitioners right to fair labour practices even with acting allowances as it stagnates their career growth and creates false impression of promotion as in this case where the petitioners had come to expect that they would be confirmed to the positions. The petitioners also lost social security opportunity taking into consideration the submission by the respondent that ,“the Petitioners have always been adequately remunerated by being paid an acting allowance in the form of non-pensionable salary increase of up to 25% of the staff member’s basic salary.”(emphasis given) That means they lost opportunity to earn pension. The employees after long period of acting and being taken back to their former positions with lower salaries and subordinate duties and the allowance being withdrawn, are exposed to lower lifestyle and lower self esteem. The Court upheld the decision of Dr. Gakeri J in *Gicheba v Nairobi Water and Sewerage Co. Ltd (Petition E083 of 2022)* [2024] KEELRC 1984 (KLR) (30 July 2024) (Judgment).The Respondent was sued in the case. The facts of the case in brief were that the Petitioner filed a Petition on 27th May, 2022 challenging his acting as Regional Manager Informal Settlement Region from 2018 to 2022. He relied on Internal advertisement and Re-advertisement dated 14th January, 2021 and 17th November, 2021 respectively and circular dated 13th May, 2021.The gravamen of the Petitioner’s case was that the Respondent advertised and shortlisted candidates for the position of Regional Manager Informal Settlement Region, a position he held in an acting capacity



from March 2018 and the Petitioner was not among those shortlisted for the position. This court found the facts comparable to the instant petition.

31. Justice Dr. Gakeri (supra) considered the Respondent's Human Resources Policy and Manual and observed at paragraph 134(of Gicheha Case,supra):-

“Although Clause 6 of the Respondent's HR Manual provided for an acting appointment “for maximum of 6 months or as determined by appointing authority”, and the Respondent's Internal Memo dated 8th March, 2018 had no fixed duration or a duration capable of being ascertained. The Respondent's retort that phrase “or as determined by appointing authority” in Clause 6.3 of the HR Manual cannot avail the Respondent as it made no determination as required by Clause 6.3 of the HR Manual which has led to the Petitioner acting as Regional Manager-Informal Settlement Region for an indefinite period which is a violation of the Petitioner's right to fair labour practices.”

32. The court established that the 1st Petitioner first acting letter for 6 months was dated 9th April 2019. His second acting letter was dated 12th April 2022. The Respondent only produced the 1st letter then transfers. The 2nd Petitioner was appointed to acting position of security officer first on the 12th June 2018 for undefined period(TT-1). A year later he was issued with another acting appointment to same position for 6 months dated 12th July 2019(GCL-1). The next letter of extension of acting in same position was over 2 years of 16th December 2021. The court upheld the decision by Justice Dr. Gakeri in Gicheha case that the Respondent could not seek refuge in its own manual as it violated the provision of 6 months acting by failure of the appointing authority to “determine” on end of 6 months as per clause 6.3 of the Manual. The Court held that the arbitrary decisions by the Respondent of keeping the petitioners in an acting period of 6 months and way beyond which were renewed erratically and applied for indefinite periods violated their right to fair labour practices under Article 41 of *the Constitution*. The court relied on decision by Byram Ongaya J. in *Silas Kaumbuthu Mbutura V Meru Central Dairy Co-operative Union Ltd (2015) e KLR* as follows:-

“The court finds that the Claimant was subjected to unfair labour practice by constantly being held on acting capacity in the post of Production Supervisor. The Claimant's claim to substantive appointment is valid and for the unfair labour practice in contravention of Article 41 of *the Constitution*, the court finds that compensation of Kshs.300,000.00 under Article 21(3)(e) of *the Constitution* will meet the ends of justice. While making that finding, the court finds that for over 18 years of service, the Claimant was required by the Respondent to serve in an acting capacity for unexplained reasons of failure to be appointed substantively as a Production supervisor or any other suitable position in the Respondent's establishment. Such conduct on the part of the Respondent in the opinion of the court was a gross violation of the Claimant's entitlement to fair labour practices as provided for in Article 41 of *the Constitution*”.

28. In *Gicheha v Nairobi Water and Sewerage Co. Ltd (Petition E083 of 2022)* [2024] KEELRC 1984 (KLR) (30 July 2024) (Judgment) At paragraph 192 the petitioner was awarded general damages for the violation of fair labour practices as follows:-

“General damages.

192. Having found that the undefined and inordinate acting by the Petitioner amounted to unfair labour practice and thus a violation of Article 41 of *the*



Constitution of Kenya, 2010, the Petitioner is awarded the sum of Kshs.500,000/= as compensation.”

33. In *Oyatsi v Judicial Service Commission* [2022] KEELRC 3 (KLR) the court upheld the decision in *Silas Kaumbuthu Mbutura V Meru Central Dairy Co-operative Union Ltd* (2015) e KLR to find unfair labour practices on account of acting period of 6 years.
34. As to whether the petition met the threshold in *Anarita Karimi* case the Court returns in the affirmative as the petitioners cited with precision the violated right under Article 41 of the Constitution and pleaded the violations with evidence. The fact that they could also have come to come through Employment Act does not weaken their case as they were seeking compensation for constitutional violations.

Whether the petitioners were entitled to the reliefs sought

35. The court held that the petitioners were entitled to compensation in terms of general damages. The other prayers were determined in the negative in the ruling of Justice Ocharo Kebira of 26th October 2023 as outlined in the judgment. The court upholds the said Ruling in determination to hold that the competitive recruitment under the Respondent’s Human Resource Policy and Manual was consistent with national values and principles under Article 10 of the Constitution and the that law overrides any legitimate expectation that the long-acting period entitled the petitioners to automatic confirmation to the said position. The applicable national value and principle being Article(10)(2)(c) “good governance, integrity, transparency and accountability;”

General Damages for compensation of violations

36. The court held that the petitioners right to fair labour practice under Article 41 of the Constitution was violated by the continuous, erratic and undefined acting periods. They are entitled to compensation for the violation.
37. In *Gicheha v Nairobi Water and Sewerage Co. Ltd (Petition E083 of 2022)* [2024] KEELRC 1984 (KLR) (30 July 2024) (Judgment) the court on finding unfair labor practice for undefined acting period 2018 to 2022 when the case was filed, awarded the petitioner damages of Kshs. 500,000.
38. The Court held that the acting period of the petitioners was erratic, undefined and inordinate and amounted to unfair labour practice and thus a violation of Article 41 of the Constitution of Kenya, 2010. The Petitioners are each awarded comparable award as in *Gicheha* case the sum of Kshs.500,000/= as compensation.
39. In conclusion, the court held the Petition as merited and entered judgment for the petitioners against the respondent as follows:-
 - i. A declaration is hereby issued that keeping the petitioners in an acting capacity for over three years was unlawful and violated their right to fair labour practice.
 - ii. To the 1st Petitioner is awarded General damages for the sum of Kshs.500,000/= as compensation.
 - iii. To the 2nd Petitioner is awarded General damages for the sum of Kshs.500,000/= as compensation.
 - iv. Costs of the petition
 - v. Interest at court rate if the amounts are not paid within 30 days from date of judgment.



40. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Petitioners :- Karue h/b Malenya

Respondent:- Yala – I seek for stay for 30 days

Court order

The court already stayed the interest application for 30 days. Prayer disallowed.

J.W. KELI,

JUDGE.

